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# State v. Hochrein Supplemental Appellant's Brief Dckt. 38316

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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NOS. 38316 & 38317
	)	
v.	)	
	)	
EDWARD R. HOCHREIN, JR.,	)	SUPPLEMENTAL APPELLANT'S
	)	BRIEF
Defendant-Appellant.	)	
_____	)	

SUPPLEMENTAL BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL  
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE  
COUNTY OF NEZ PERCE

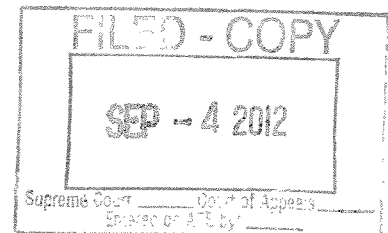
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## STATEMENT OF THE CASE

### Nature of the Case

In Mr. Hochrein's case, defense counsel and the prosecutor entered into a factual stipulation that admitted several essential elements of the charged offense of felony violation of a no contact order. The district court entered this stipulation without first creating any record that Mr. Hochrein had waived his Sixth Amendment and due process right to a jury determination regarding these essential elements of his charged offense. In addition to his other claims on appeal<sup>1</sup>, and under well-established principles of law, Mr. Hochrein asserts that this constitutional violation rose to the level of a fundamental error, as well as a structural error, which entitles him to a new trial.

### Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Hochrein's Appellant's Brief. They need not be repeated in this Supplemental Appellant's Brief, but are incorporated herein by reference thereto.

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<sup>1</sup> The Idaho Court of Appeals has permitted Mr. Hochrein to raise this issue on appeal, in addition to those issues raised in his prior Appellant's Brief in this case, pursuant to Mr. Hochrein's Motion for Leave to File Supplemental Brief.

## ISSUE

Did the district court err, and violate Mr. Hochrein's right to a jury trial and to due process, when the district court accepted a factual stipulation entered into by Mr. Hochrein's counsel that relieved the State of its burden of proof as to essential elements of the charged offense without obtaining Mr. Hochrein's personal waiver of his right to a jury determination as to these elements; and did this error rise to the level of both a fundamental and a structural error that requires a new trial?

## ARGUMENT

The District Court Erred, And Violated Mr. Hochrein's Right To A Jury Trial And To Due Process, When The District Court Accepted A Factual Stipulation Entered Into By Mr. Hochrein's Counsel That Relieved The State Of Its Burden Of Proof As To Essential Elements Of The Charged Offense Without Obtaining Mr. Hochrein's Personal Waiver Of His Right To A Jury Determination As To These Elements; And This Error Rose To The Level Of Both A Fundamental And A Structural Error That Requires A New Trial

### A. Introduction

It is well-established law that due process and the right to a jury trial in a criminal case carries with it the guarantee that the State must prove every element of the charged offense beyond a reasonable doubt. It is equally established under Idaho law that the right to a jury determination is personal to the defendant, and the waiver of this right must be made by the defendant alone – it is not a matter of strategic determination that can be made by trial counsel. In order to effectuate the personal nature of this right, established Idaho law requires that any waiver of this right to a jury determination must be made on the record and the waiver must be shown from the record to be knowing, intelligent and voluntary on the part of the defendant.

In this case, the factual stipulation that waived the jury's determination as to essential elements of the charged offense was solely entered into by defense counsel and the prosecutor. There is no record that Mr. Hochrein had personally waived his right to a jury determination as to these elements, nor that any waiver on his part was entered into knowingly, intelligently, and voluntarily. Mr. Hochrein submits that this was not only fundamental error, but also structural error, that requires reversal of his conviction.

B. Standard Of Review

In cases of unobjected to error, this Court applies a three-step process of review to determine whether the error alleged rises to the level of a fundamental error. *State v. Perry*, 150 Idaho 209, 226 (2010). First, the defendant must demonstrate that one or more of the defendant's unwaived constitutional rights were violated. *Id.* Second, the error must be clear and obvious from the record without the need for additional information not contained within the record on appeal. *Id.* Finally, the defendant must show the error affected the defendant's substantial rights. *Id.* As to this last prong, the defendant must show a reasonable possibility that the error complained of affected the outcome of the trial.

C. The District Court Erred, And Violated Mr. Hochrein's Right To A Jury Trial And To Due Process, When The District Court Accepted A Factual Stipulation Entered Into By Mr. Hochrein's Counsel That Relieved The State Of Its Burden Of Proof As To Essential Elements Of The Charged Offense Without Obtaining Mr. Hochrein's Personal Waiver Of His Right To A Jury Determination As To These Elements; And This Error Rose To The Level Of Both A Fundamental And A Structural Error That Requires A New Trial

In this case, Mr. Hochrein's counsel and the prosecutor entered into two factual stipulations, largely identical in content, that admitted several essential elements of the charged offense in this case of felony violation of a no contact order. (State's Exhibits 3, 3A.) These factual stipulations conceded that: (1) a no contact order was issued against Mr. Hochrein in a prior criminal case, and the no contact order was in effect at the time of the alleged contact; (2) the order was issued pursuant to a charge or conviction that would properly support issuance of such a no contact order; and (3) that the no contact order prohibited contact with Ms. Lewis. (State's Exhibits 3, 3A.) Under the statute defining Mr. Hochrein's offense, this stipulation covered several essential elements of his charged offense. See I.C. §§ 18-920(2)(a), (b), (c).



The stipulations were read to the jury prior to the presentation of the State's case-in-chief, as well as later on during the presentation of evidence during trial. (Trial Tr., p.141, L.16 – p.142, L.9, p.222, L.13 – p.224, L.22.) Mr. Hochrein never personally signed either stipulation. (State's Exhibits 3, 3A.) Nor did the district court ever question Mr. Hochrein personally as to whether he understood the legal effect of his waiver, as to the fact that he had a right to a jury determination as to each of the elements stipulated to, nor did the court ask any questions to otherwise ensure that Mr. Hochrein was personally waiving his jury trial rights and was doing so in a knowing, intelligent, and voluntary manner. (See Trial Tr., *generally*.)

In accepting this stipulation without ever obtaining a personal waiver from Mr. Hochrein of his right to a jury determination as to these essential elements of the charged offense, the district court violated Mr. Hochrein's well-established constitutional rights to due process and a fair trial.

Where a defendant stands on his or her right to a jury trial in a criminal case, the State carries the burden of proving every essential element of the charged offense beyond a reasonable doubt. See, e.g., *State v. Erickson*, 148 Idaho 679, 685 (Ct. App. 2010) (citing *Jackson v. Virginia*, 443 U.S. 307, 309 (1979); *State v. Mubita*, 145 Idaho 925, 942 (2008); *State v. Crowe*, 135 Idaho 43, 47 (Ct. App. 2000)); *State v. Gusman*, 125 Idaho 810, 813 (Ct. App. 1993). If the defendant is deprived of the right to a jury determination as to each of the elements of the charged offense, this violates a defendant's constitutional rights to a jury trial and to due process. *State v. Nath*, 137 Idaho 712, 716-717 (2002) (jury instruction that removed essential element from the jury's consideration violated defendant's right to a jury trial and to due process).

Moreover, the right to a jury determination as to each element of the charged offense in a criminal case is personal to the defendant, and may not be waived solely by trial counsel. *State v. Swan*, 108 Idaho 963, 964-966 (1985). This is the case even where the defendant was present at the time the waiver was made by defense counsel and does not voice any objection at that time. *Id.* The character of the waiver of the right to a jury determination must be shown from the record to be knowing, intelligent, and voluntary on the part of the defendant; and the inference of a constitutionally valid waiver will not be inferred from a silent record. *State v. Watson*, 99 Idaho 694, 702 (1978).

The Idaho Court of Appeals' opinion in *State v. Cheatham* is instructive on this question. *State v. Cheatham*, 139 Idaho 413 (Ct. App. 2003). In *Cheatham*, defense counsel stipulated to the truth of the State's persistent violator allegation following a jury trial on the underlying criminal charges. *Id.* at 414-415. Although the defendant was present at the time of counsel's stipulation, the district court never asked the defendant whether he assented to the stipulation or understood its effect regarding the State's burden of proof or with regard to the ultimate punishment the defendant would thereafter face. *Id.* at 415.

The *Cheatham* Court held that this was reversible error. *Cheatham*, 139 Idaho at 418-419. The court first noted that the defendant had the right to a jury determination as to the facts stipulated to by trial counsel. *Id.* at 416. After canvassing various cases from other jurisdictions on similar issues, the *Cheatham* court held that, "due process principles preclude the acceptance to the truth of persistent violator allegations without judicial inquiry to determine that the defendant makes the admission voluntarily and with an understanding of the consequences. *Id.* at 417-418. The court further held that a

record demonstrating solely that defense counsel entered into this stipulation is not sufficient to showing a knowing, intelligent and voluntary waiver by the defendant. *Id.*

In this case, there is no record that Mr. Hochrein ever personally waived his right to a jury determination as to the essential elements of his charged offense that were contained within the stipulation entered into by his trial counsel and the prosecutor. The stipulations themselves were only signed by Mr. Hochrein's counsel and the prosecutor. (State's Exhibits 3, 3A.) The district court never questioned Mr. Hochrein on the record about this stipulation in order to insure that his waiver of the right to a jury determination as to these elements was being made knowingly, intelligently and voluntarily. (See Trial Tr., *generally*.) Under clearly established law, this violated Mr. Hochrein's due process rights to a jury determination as to each element of the charged offense.

This error could not have been the result of a strategic determination on the part of trial counsel, as Idaho law clearly establishes that the decision whether or not to insist upon the right to a jury determination rests solely with the defendant, and cannot be made as a strategic determination by trial counsel. *Swan*, 108 Idaho at 964-966. The absence of any valid waiver, made personally and on the record by Mr. Hochrein, is also plain on the face of the record in this case. Thus, the remaining question for this Court is whether this error requires reversal. Mr. Hochrein submits that this error rises to the level of a structural error for which prejudice must be presumed. However, even assuming that Mr. Hochrein must demonstrate prejudice, he submits that the prejudice of this error requires reversal.

This error is a species of the sort of error recognized by the U.S. Supreme Court in *Sullivan v. Louisiana* to be a structural error that is not amenable to the traditional harmless error test. See *Sullivan v. Louisiana*, 508 U.S. 275, 277-282 (1993). The

traditional harmless error test looks not to what hypothetical verdict may have been rendered by a jury in absence of the error, but to what the impact was on the *actual* jury in the particular case on appeal. *Id.* at 279-280. In the case of a factual stipulation that relieves the State of its burden of proof as to every element, because the stipulation is the only “evidence” on the issue, there could be no verdict as to every element of the State’s burden of proof beyond a reasonable doubt in absence of the stipulation. Accordingly, such errors will always and will necessarily have contributed to the jury’s verdict. *Sullivan*, 508 U.S. at 277-282; *see also Swan*, 108 Idaho at 966 (reversing and remanding the case for a new trial without engaging in a harmless error analysis where defense counsel, but not the defendant, waived the right to a jury trial).

Even if this error does not rise to the level of a structural error, upon which prejudice is presumed, it was certainly not a harmless error in this particular case. As was noted by the U.S. Supreme Court in *Sullivan*, this Court may not assume a hypothetical set of facts under which jurors received evidence that was not actually submitted in this case to determine whether this hypothetical jury would still have convicted the defendant. *Id.* at 279-280. “That must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury trial guarantee.” *Id.* Accordingly, this Court must determine whether, under the state of the evidence as it actually existed at Mr. Hochrein’s trial, there is a reasonable possibility that the error complained of affected the outcome of the trial. *Perry*, 150 Idaho at 226.

This standard has been met. In the absence of this unlawful and constitutionally invalid stipulation, the State presented no evidence to the jury of the existence of the prior no contact order, the terms of its duration or the scope of its coverage, or whether

it was issued for a criminal charge or conviction for which such an order could appropriately be issued. Each of these facts constitute elements of the charged offense. See I.C. § 18-920(2). The underlying criminal no contact orders that Mr. Hochrein was alleged to have violated were never presented to the jury at trial, although they were presented by the State at the preliminary hearing. Because this stipulation was the only evidence of several elements of the charged offense in this case, there is reason to believe that the erroneous admission of the invalid stipulation in this case contributed to the jury's verdict.

#### CONCLUSION

Mr. Hochrein respectfully requests that this Court reverse his conviction for felony violation of a no contact order with prejudice because the State presented insufficient evidence to sustain this conviction. In the alternative, Mr. Hochrein asks that this Court reverse his judgment of conviction and sentence for felony violation of a no contact order and remand this case for further proceedings.

DATED this 4<sup>th</sup> day of September, 2012.

A handwritten signature in dark ink, appearing to read "Sarah E. Tompkins", written over a horizontal line.

SARAH E. TOMPKINS

Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 4<sup>th</sup> day of September, 2012, I served a true and correct copy of the foregoing APPELLANT'S BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

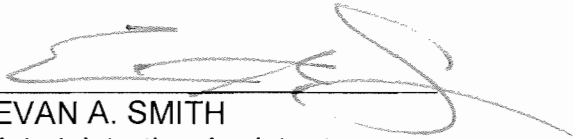
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